

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
STATESVILLE DIVISION

5:05CV216-V

5:03CR33-V

GLEND A MONIQUE MADD OX, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

**ORDER**

**THIS MATTER** comes before the Court upon Petitioner's Motion to Vacate, Set Aside, or Correct Sentence, filed June 30, 2005.

In her Motion to Vacate, Petitioner claims, among other things, that she asked her counsel to file a direct appeal but that her counsel failed to file the requested appeal. An attorney's failure to file a notice of appeal, when requested by his client to do so, is per se ineffective assistance of counsel. Prejudice to the defendant is presumed irrespective of the merits of the appeal. Evitts v. Lucey, 469 U.S. 387, 391-405 (1985); United States v. Peak, 992 F.2d 39 (4<sup>th</sup> Cir. 1993). Accordingly, on a showing that counsel was requested to appeal but failed to do so, the prescribed remedy is to vacate the original judgment and enter a new judgment from which an appeal can be taken. Peak, 992 F.2d at 42.

Regardless of how Respondent responds to Petitioner's allegation, at a minimum a factual dispute will exist over whether or not Petitioner requested her counsel to file a direct appeal. Consequently, the Court will vacate the original judgment and direct the Clerk to enter a

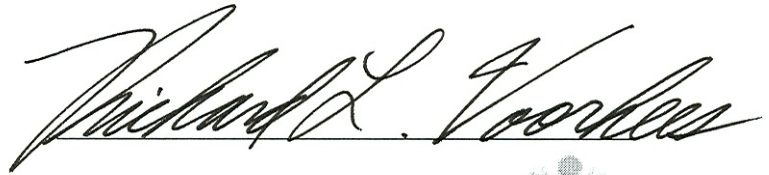
new judgment from which an appeal can be taken.

**THEREFORE, IT IS HEREBY ORDERED that:**

1. Petitioner's Motion to Vacate is **GRANTED in part** and **DENIED in part**;
2. All of Petitioner's claims except for her ineffective assistance of counsel claim based upon her attorney's failure to file an appeal are **DISMISSED WITHOUT PREJUDICE**;
3. Petitioner's criminal judgment is vacated due to her attorney's failure to file a direct appeal;
4. The Clerk is directed to prepare a new criminal judgment with the same sentence and conditions;
5. The Clerk is directed to file a notice of appeal on Petitioner's behalf.



**Signed: July 25, 2005**

A handwritten signature in black ink, reading "Richard L. Voorhees". The signature is written in a cursive style with a horizontal line underneath the name.

Richard L. Voorhees  
United States District Judge

